In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1066

SALVATORE CIRAMI AND JAMES CIRAMI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were found guilty on 18 counts of a 19-count indictment charging tax offenses (App. 151a-152a).[1] Salvatore Cirami was fined a total of $4,800 and placed on probation for two years (App. 151a). James Cirami was fined a total of $2,000 and placed on probation for two years (App. 152a). The court of appeals affirmed (Pet. App. 1a-11a).

The principal question presented by the petition is whether the trial court properly struck as surplusage certain language from each of the first 17 counts of the indictment.

---

[1] "App." refers to the appendix filed in the court of appeals. "Tr." refers to the transcript of proceedings at the trial.

The pertinent facts are as follows: Air Package Distribution Service, Ltd., is a trucking company that provides pick-up and delivery service to airlines (Tr. 141, 298). During the years at issue, it was operated by Salvatore Cirami, the corporation's president, and his son, James Cirami, its vice-president (Tr. 297, 298-299). Count 1 of the indictment alleged that petitioners willfully attempted to evade and defeat a large part of the federal income taxes withheld from wages and Federal Insurance Contributions Act (Social Security) taxes due and owing to the United States by filing false and fraudulent employer's quarterly tax returns. The falsity alleged was based upon a comparison of the total wages reported to have been paid and the taxes due thereon with the higher amount of wages actually paid and the amount of taxes which were in fact due (Pet. App. 4a).

The central issue at the trial was whether the truck drivers of the corporation were employees of the corporation or independent contractors (Tr. 447-449). On that issue the court of appeals held that "the jury was abundantly justified in concluding, under unchallenged and proper instructions, that the truck drivers were regular employees of the corporation and that both appellants willfully participated in the attempt to evade corporate taxes by filing false returns that concealed the employee status of the drivers" (Pet. App. 3a).

1. The question raised by the petition concerns the trial court's deletion of certain language from the first 17 counts of the indictment. After alleging the amount of wages actually paid, and that petitioners filed a false and fraudulent employer's quarterly tax return, Count 1 concluded as follows: " * * * upon which wages the defendants owed to the United States of America federal income taxes withheld from wages and Federal Insurance

Contributions Act taxes due in the total amount of $3,-467.36," the reporting and payment failures being charged as violations of 26 U.S.C. 7201 and 18 U.S.C. 2 (App. 3a). Counts 2 through 17 contained substantially similar language (App. 3a-5a).[2] Counts 18 and 19 charged that petitioners counseled and advised the preparation and presentation of United States Information Returns (Form 1099) that were false and fraudulent as to a material matter in violation of 26 U.S.C. 7206(2), in that they represented that the recipients of corporate funds were independent contractors when in fact they were corporate employees (App. 6a). After the government rested its case, the trial court deleted the above-quoted language in the first 17 counts of the indictment as surplusage on the government's motion (App. 109a-117a).

Contrary to petitioners' argument (Pet. 5-12), the trial court properly struck this language from the indictment. As this Court first pointed out in *Ford* v. *United States*, 273 U.S. 593, 602, a "useless averment" of an indictment may be ignored. As a result, courts have regularly permitted juries to disregard as surplusage language in an indictment not essential to the offense charged. See, *e.g.*, *United States* v. *Archer*, 455 F.2d 193 (C.A. 10), certiorari denied, 409 U.S. 856; *United States* v. *Colasurdo*, 453 F.2d 585 (C.A. 2), certiorari denied, 406 U.S. 917. See also *Heisler* v. *United States*, 394 F.2d 692, 695-696, nn. 2-6 (C.A. 9), certiorari denied, 393 U.S. 986.

Here, the clauses in question alleged the true amount of taxes owing with respect to each count and that the tax was owed by petitioners rather than the corporation. However, it was apparent that petitioners were not personally liable for the corporate taxes and that the

[2]Counts 15 through 17 dealt with Federal Unemployment Taxes (App. 4a-5a). Count 16 was dismissed.

indictment was concerned with the corporation's obligation for the taxes on the wages paid to its truck drivers. The gist of the offenses alleged in these counts was not that a specific amount of money was owing to the government but that petitioners had willfully attempted to evade certain taxes of their corporation by filing false tax returns. Hence, the final clause in each count related only to the amount of tax owing and by whom it was owed, in an effort to detail the manner in which the returns were false. Since the material in these clauses was not an essential element of the tax evasion offense charged under 26 U.S.C. 7201,[3] their deletion by the district court did not render the indictment insufficient (see, *e.g.*, *United States* v. *Lepowitch*, 318 U.S. 702, 704; *Hayes* v. *United States*, 407 F.2d 189, 192 (C.A. 5); *Heasley* v. *United States*, 218 F.2d 86, 88-89 (C.A. 8), certiorari denied, 350 U.S. 882) and did not materially alter its character.[4]

---

[3]In a tax evasion case, the government need not prove the exact amount of tax evaded. *Holland* v. *United States*, 348 U.S. 121, 138; *United States* v. *Johnson*, 319 U.S. 503, 517.

[4]Contrary to petitioners' argument, there is no conflict with *Stirone* v. *United States*, 361 U.S. 212. In that case, the defendant was prosecuted for interfering with interstate commerce, *viz.*, the importation of sand into Pennsylvania, and the jury convicted him of interfering with the exportation of steel, a completely different offense. Moreover, there is no conflict with any of the other cases relied upon by petitioners (Pet. 11-12). In *Paritem Singh Poonian* v. *United States*, 294 F.2d 74 (C.A. 9), the defendant was indicted for evading his income taxes but the proof showed that they were the obligations of his mother. Under those circumstances, no crime had been committed. In *United States* v. *Williams*, 412 F.2d 625 (C.A. 3), and in *United States* v. *Fischetti*, 450 F.2d 34 (C.A. 5), certiorari denied, 405 U.S. 1016, the defendants were convicted of entirely different offenses than those originally alleged in the indictments.

2. Finally, petitioners argue (Pet. 12-14) that the offenses alleged in Counts 18 and 19 were not crimes, since they did, in fact, report that payments had been made to the truck drivers. Those counts, however, were not based upon a mere failure to report the payments but were concerned with the preparation and presentation of false Forms 1099, which indicated, in violation of 26 U.S.C. 7206(2), that the truck drivers were independent contractors rather than employees. The jury was entitled to conclude on all of the evidence that the filing of these forms, rather than being an innocent error reflecting a mere difference of opinion as to the status of the recipients of corporate payments, was part of the entire tax evasion scheme set into motion and perpetuated by petitioners. This situation stands in sharp contrast to those presented by the cases relied upon by petitioners (Pet. 13), where there was no attempt to deceive the government as to a material matter.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

DOJ-1975-04